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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PETER HUNKEL, as Cotrustee, etc., et al., Plaintiffs and Appellants, v. JOHN GERHARDT, as Cotrustee, etc., et al., Defendants and Respondents.	H044753 (Santa Cruz County Super. Ct. No. 16CV00199)

I. INTRODUCTION

Plaintiffs Peter Hunkel and Laurie Hunkel, as cotrustees of the Hunkel Family 2002 Trust, filed a civil action against their homeowners association and several members of the association, seeking declaratory and injunctive relief. The dispute arose after one set of homeowners, defendants Janet Newman and John Gerhardt, as cotrustees of the Newman-Gerhardt 2010 Revocable Trust, put a fence on their property that, according to the homeowners association's purported board of directors, violated the declaration of covenants, conditions, and restrictions (CC&R's). Defendants Newman and Gerhardt disputed, among other matters, which members constituted the board of directors of the association and whether the board had approved the fence.

In the civil action, the issue of whether there was "a duly-elected Board following established procedures" was tried first before any other issue. Following a bench trial,

the court found that the homeowners association had been operating without bylaws and "adjudicat[ing] decisions ad hoc as things develop," which violated the association members' right to due process. The court rendered a judgment in favor of the defense. Upon a subsequent motion by defendants Newman and Gerhardt, the court ordered plaintiffs to pay attorney's fees of $111,215.50 under Civil Code section 1717,[1] which authorizes attorney's fees to the party prevailing on a contract, and section 5975, which is part of the Davis-Stirling Common Interest Development Act (§ 4000 et seq.; the Davis-Stirling Act).

On appeal, plaintiffs contend that the trial court erred by awarding attorney's fees under either section 1717 or 5975. Regarding section 1717, plaintiffs argue that defendants Newman and Gerhardt did not prevail on a contract providing for attorney's fees, that is, the CC&R's. Regarding section 5975, plaintiffs argue that the parties agreed that the Davis-Stirling Act did not apply to the case.

For reasons that we will explain, we will affirm the order awarding attorney's fees.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

Plaintiffs owned property on Dawn Lane in Santa Cruz County, where they were members of the Dawn Lane Owners Association (Association). In January 2016, plaintiffs filed a verified complaint alleging two causes of action for (1) declaratory relief and (2) injunctive relief against the Association; defendants Newman and Gerhardt, who were also property owners on Dawn Lane; and the alleged owners of five other properties on Dawn Lane.[2]

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

[2] The alleged owners of the other five lots were: (1) Jon Erskine and Christine Erskine; (2) James Herbert; (3) Sarah Gonzales; (4) Tristan Grell and Katherine Grell as cotrustees of the Tristan Grell and Katherine Grell Revocable Trust; and (5) Gerardo Zambrano, Marta Caldera, and Adrian Zambrano.

Plaintiffs alleged that the Association and its board of directors were responsible for overseeing the application of the CC&R's, which "govern[ed] the common interest development" encompassing the Dawn Lane properties. The CC&R's prohibited the installation of a fence on a property unless the fence had been approved in writing by the Association's board. The CC&R's required that plans and specifications "shall be submitted to the Board for approval as to quality of workmanship and design and harmony of external design with existing structures, and as to location in relation to surrounding structures, topography, and finish grade elevation."

In June 2015, defendants Newman and Gerhardt submitted an application to the Association's board for review of proposed exterior improvements to their property. The proposal included construction of a fence along one side of defendants' property. The board approved part of the application but rejected the application with respect to the fence, purportedly based on the CC&R's. Defendants submitted a follow-up application in or about July 2015, but the board considered the application incomplete.

Defendants Newman and Gerhardt thereafter constructed the fence on their property in accordance with their original application. The board allegedly called an Association meeting to give defendants the opportunity to explain why the fence should not be removed, but defendants did not appear. The board then allegedly notified defendants in writing that the fence needed to be removed within 30 days, or fines would be assessed for violating the CC&R's. Defendants refused to remove the fence.

According to plaintiffs, defendants Newman and Gerhardt contended that a majority of the Association's members had approved the fence. Defendants also allegedly contended that the board lacked the authority to enforce the CC&R's, and that any actions taken by the board in rejecting the proposed fence was invalid. Plaintiffs, on the other hand, believed that the board had acted within its powers as provided by the CC&R's. According to plaintiffs, defendants wanted to discuss with all the property owners whether to restate, revoke, or amend the CC&R's and/or dissolve the Association.

Plaintiffs alleged that a controversy had arisen as to: (1) "the application and interpretation of the [CC&R's]," (2) "the authority of the Board to enforce the provisions thereof," and (3) the right, if any, of the owners "to dissolve the Association and/or amend or terminate the [CC&R's]."

In the first cause of action for declaratory relief, plaintiffs sought a judicial determination of (1) "the Board and the parties' respective authority," (2) the "rights and duties under the [CC&R's] and as members of the Association," and (3) "whether the [CC&R's] permit dissolution of the Association and amendment or termination of the [CC&R's] prior to the expiration of the initial term" of the CC&R's. Plaintiffs alleged that a judicial determination was necessary so that the parties "may ascertain their rights and duties under the [CC&R's] and inform their future conduct with respect to enforcement thereof."

In the second cause of action for injunctive relief, plaintiffs alleged that defendants Newman and Gerhardt did not "recognize the authority" of the board or the Association to enforce the CC&R's, and that defendants may take further action in "derogation of" the CC&R's during the pendency of the action, "without observing the requirements and restrictions on such actions set forth in the [CC&R's] and/or California law concerning the governance of the Association." Plaintiffs alleged that irreparable injury would result if defendants' "threatened conduct" was not enjoined.

In the prayer for relief, plaintiffs requested: (1) a declaration that the acts of the Association and its board under the CC&R's in rejecting defendants' application were valid, (2) a declaration that the Association could not be dissolved and the CC&R's could not be terminated during the initial term, and (3) an injunction restraining defendants Newman and Gerhardt from taking any action "with purported authority of the Association" or forcing a vote by Association members to dissolve the Association and/or modify or terminate the CC&R's.

B. *Defendants Newman and Gerhardt's Answer*

Defendants Newman and Gerhardt filed a verified answer. They alleged that their follow-up application was not incomplete, and that they waited more than 30 days but never received a decision from the board. Defendants alleged that in early July 2015, they obtained approval from a majority of the homeowners to install the fence. Defendants contended that approval by a majority of the homeowners "constituted approval by the [board of the Association]." Defendants also denied that the Dawn Lane properties were a "common interest development."

In the prayer of their answer, defendants Newman and Gerhardt sought a declaration that: (1) the acts of the Association and its purported board in rejecting defendants' application were invalid, (2) the board was comprised of all the homeowners, (3) defendants' fence and trellis had been approved by the Association and could remain in place, and (4) the Association was not a common interest development.

C. *Pre-Trial Motions in Limine*

In ruling on motions in limine, the trial court indicated that there were disputed factual issues concerning "whether proper procedures were followed to enforce the [CC&R's]." The court stated that plaintiffs, as part of their burden of proof, had "to establish that a duly elected Board of Directors followed proper procedures as it related to the issues in this case." The court indicated that plaintiffs might meet that burden by showing that "bylaws were followed." When the court asked whether a signed copy of the bylaws existed, plaintiffs' counsel acknowledged that only an unsigned copy of the bylaws had been located.

The trial court indicated that trial would proceed first on the "procedural issue[]," meaning "that a duly-elected Board following established procedures came to the decisions at issue in this case." If the court ruled adversely to the plaintiffs on that issue, then no further issues would be heard. Plaintiffs' counsel and counsel for Newman and

Gerhardt expressed their agreement regarding the order in which the issues would be tried.

The trial court also raised the issue of whether the Davis-Stirling Act or the Corporations Code applied to the case. The court gave a "tentative indication" that the Davis-Sterling Act did not apply because there was no common area, or area jointly owned by all property owners, in the development. Plaintiffs' counsel stated that she was "comfortable with that" ruling, as long as the CC&R's were treated "as an equitable servitude upon the parcels." Counsel for Newman and Gerhardt responded, "That's never been a problem." The court thereafter ruled that the Davis-Sterling Act did not apply and that the Corporations Code did apply. The court also obtained the parties' stipulation that the CC&R's were "equitable servitudes upon the land."

D. *The Trial*

The bench trial was held in January 2017. Appearing at trial were plaintiffs, the defendant Association, defendants Newman and Gerhardt, and two other sets of defendant homeowners.

1. Opening statements

In an opening statement, plaintiffs indicated that two couples and a construction company originally owned the land in their development. In 2007, those couples and the construction company obtained approval to subdivide the land into seven lots. That same year, they recorded the CC&R's and filed articles of incorporation regarding the Association. An attorney prepared bylaws for the Association, and three individuals—among the two couples and the construction company—were elected as the initial board of directors. Each of the seven lots was thereafter sold to new owners, including to plaintiffs. Management of the Association was handed over to the new homeowners, and in 2013, a new four-person board was purportedly elected. Defendants Newman and Gerhardt purchased their property thereafter. The four-person board subsequently considered the defendants' application concerning improvements to their property. In

their opening statement, plaintiffs requested that the court "affirm" the election of the Association's board and determine that the board had the authority to make decisions under the CC&R's.

Defendants Newman and Gerhardt in an opening statement indicated that no signed bylaws existed, and that only a "working draft copy" had been found. Defendants stated that proper notice was not given concerning the Association meeting where the four-person board was elected, no list of candidates was provided prior to the meeting, no secret ballots were administered, and nothing established the number of directors on the board. Further, the CC&R's and the draft bylaws allowed only one vote for each property, but the four-person board included two people who apparently owned one property. Defendants believed the evidence would show that the four-person board was not properly elected, yet that board purported to act on defendants' application for improvements to their property. According to defendants, there was no legal basis for the board's order requiring removal of the wooden trellis from defendants' front yard. Defendants requested that the court issue a declaration allowing them to keep the trellis "at the present time and for the foreseeable future."

2. The evidence

The trial court heard testimony from four witnesses. The first witness was one of the original developers who served on the initial three-person board of the Association. The court also heard testimony from three of the four board members who purportedly served on the subsequent four-person board. The court admitted several documents into evidence, including copies of the purported bylaws.

3. The judgment

After hearing argument from the parties, the trial court rendered judgment for the defense. The court determined that plaintiffs had not established that bylaws were adopted by the Association. The court explained that there was conflicting evidence as to "what was intended to be the actual set of bylaws for this nonprofit mutual benefit

corporation," and that the original three-member board left the Association a "mess." The court further stated: "When a corporation operates without bylaws and adjudicates decisions ad hoc as things develop, it violates fundamental due process because the members of that small corporation have no reason to expect how things will be adjudicated. Ultimately decisions made in that ad hoc basis violate fundamental due process."

Although the trial court found in favor of defendants, the court did not grant the request for declaratory relief in defendants Newman and Gerhardt's answer. The court explained that defendants' request for a decision in their favor was "really not before" the court, "other than that the [p]laintiffs have not prevailed in either of their two causes of action."[3]

After the trial court rendered its decision, the court made the following observation: "Unfortunately, this association has to go back and figure out what they're going to do to govern themselves. Once they do that in a manner that complies with due process, they can start making decisions to effect their governance. Until they do, I think they'll keep coming back to this court for a similar result." The court concluded by saying, "It's unfortunate that this neighborhood has had to comply with the mess that those developers left you. You thought you had some rules that you could live by, and unfortunately the law does not support that. [¶] I appreciate that you've spent a lot of money, you've spent a lot of time, you've spent a lot of emotion trying to live together. And it's just unfortunate that you were given a can of worms. And I know you've done you're best, but I don't get to pick. I just have to follow the law and apply the law. So really, there are no winners here today if you have to go back and start all over. [¶] I hope you can do that as a community, and in good faith."

[3] The trial court had previously questioned defendants' ability to obtain a declaratory judgment in the absence of a cross-complaint for declaratory relief.

In a written judgment filed January 27, 2017, the trial court denied plaintiffs' requests for declaratory relief and injunctive relief. The court awarded costs to defendants Newman and Gerhardt and stated that their "entitlement to attorneys fees shall be determined by noticed motion."

E. *The Trial Court's April 13, 2017 Order Regarding Defendants Newman and Gerhardt's Motion for Attorney's Fees*

Defendants Newman and Gerhardt filed a motion for attorney's fees, and plaintiffs opposed the motion. After a hearing, by written order filed April 13, 2017, the trial court determined that defendants were entitled to attorney's fees under sections 1717 and 5975. The court awarded attorney's fees in the amount of $111,215.50.

III. DISCUSSION

On appeal, plaintiffs contend that the trial court erred in awarding attorney's fees under sections 1717 and 5975.[4]

Regarding section 1717, which authorizes attorney's fees to the party prevailing on a contract, plaintiffs argue that defendants Newman and Gerhardt did not prevail on the contract alleged in the pleadings, that is, the CC&R's. Plaintiffs contend that "the question of the enforceability of the [CC&R's] was never reached" by the trial court. Instead, the court "heard only a procedural question regarding the bylaws of the [Association] and decided *only* whether there was a duly-elected Board of the [Association] established pursuant to valid procedures. The trial court found that no valid bylaws existed, [and] therefore there was no duly-elected Board." Plaintiffs observe that no party obtained declaratory relief from the court, and that the court stated there were "no winners" in this case.

[4] Plaintiffs filed a notice of appeal on May 30, 2017, regarding the judgment and the order awarding attorney's fees. This court, upon motion by defendants, dismissed plaintiffs' appeal from the judgment as untimely filed.

Regarding section 5975, which is part of the Davis-Stirling Act, plaintiffs contend that all the "parties and the trial court agreed" that the Act did not apply, and therefore attorney's fees could not be awarded under the Act. (Italics omitted.)

Defendants Newman and Gerhardt contend that plaintiffs failed to provide an adequate record on appeal, including by providing defendants' written motion for attorney's fees and a reporter's transcript of the hearing on the motion. On this basis, defendants argue that the trial court's order awarding attorney's fees should be affirmed. Defendants further contend that the court properly awarded attorney's fees under sections 1717 and 5975.

In reply, plaintiffs observe that this court granted their motion to augment the record to include the reporter's transcript of the hearing on defendants' motion for attorney's fees.

A. *Adequacy of the Appellate Record*

We first address the contention by defendants Newman and Gerhardt that plaintiffs have failed to provide an adequate record on appeal.

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. " 'All intendments and presumptions are indulged to support [the judgment or order] on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord, *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Therefore, the appellant has "the burden . . . to prove an adequate record to assess error." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 (*Maria. P.*).) " 'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' [Citations.]" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) Thus, where the appellant fails to provide an adequate record as to any issue the appellant has raised on appeal, the issue must be resolved against the appellant. (*Maria P.*, *supra*, at pp. 1295-1296.)

In order for this court to review the basis of a trial court's ruling on a motion, the appellant must provide the motion, the opposition, and the trial court's order. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) In the absence of these documents, an appellant generally cannot meet his or her burden to show error. (*Ibid.*; see also *McLaughlin v. Walnut Properties, Inc.* (2004) 119 Cal.App.4th 293, 299, fn. 6.)

In this case, plaintiffs provided the trial court's order granting defendants' motion for attorney's fees. Plaintiffs also augmented the record to include the reporter's transcript of the hearing on the motion. Plaintiffs failed, however, to provide defendants' written motion for attorney's fees or plaintiffs' opposition papers. To meet their burden on appeal to show error, plaintiffs should have provided these documents. Notwithstanding the absence of these necessary documents in the record on appeal, we have considered the substance of plaintiffs' appeal and determine that the trial court properly awarded attorney's fees to defendants for the following reasons.

B. *General Legal Principles Regarding Attorney's Fees Under Civil Code Section 1717*

The attorney's fees provision in the parties' CC&R's state: "The Association, or any owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, now or hereafter imposed by the provisions of this declaration, and in such an action shall be entitled to recover reasonable attorney's fees as are determined by the court."[5]

Section 1717, subdivision (a) provides that, "[i]n any *action on a contract*, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing

[5] Plaintiffs attached a copy of the CC&R's to their verified complaint. Defendants in their verified answer admitted that the document was a true and correct copy of the CC&R's.

party, then the party who is determined to be the *party prevailing on the contract*, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Italics added.)

"The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610.) For example, if a contract provides the right to attorney's fees to one party, but not to the other party, "the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not' (§ 1717, subd. (a))." (*Id.* at p. 611.) Likewise, "[i]t is now settled that a party is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed. [Citations.]" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870 (*Hsu*).) Otherwise, "[t]he statute would fall short of this goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed." (*Ibid.*)

The requirement under section 1717 that the action be "on a contract" (*id.*, subd. (a)) "does not mean only traditional breach of contract causes of action." (*Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 486 (*Mitchell Land*).) Rather, "on a contract" (§ 1717, subd. (a)) has been liberally construed by courts to include an action that " 'involves' " a contract. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 240; accord, *Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 426; *Mitchell Land*, *supra*, at p. 486.) For example, in a declaratory relief action, when "the parties seek a determination of their respective rights and duties under a contract . . . , the action is ' "on a contract" for purposes of section 1717.' " (*Mitchell Land, supra,* at p. 489; accord, *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 348 (*Kachlon*); *Milman v.*

Shukhat (1994) 22 Cal.App.4th 538, 545.) Likewise, a claim for injunctive relief, where the claim is "contractual in nature" (*Kachlon*, *supra*, at p. 348), is also an action "on a contract" (§ 1717, subd. (a)).

Regarding the determination of "the party prevailing on the contract," section 1717 provides that it is "the party who recovered a greater relief in the action on the contract." (*Id.*, subd. (b)(1).) The trial court "may also determine that there is no party prevailing on the contract for purposes of this section." (*Ibid*.)

The California Supreme Court has set forth rules to guide a trial court's exercise of discretion in determining the prevailing party under section 1717. A "trial court has *no* discretion to deny attorney fees to the successful litigant" "when the decision on the litigated contract claim is purely good news for one party and bad news for the other." (*Hsu*, *supra*, 9 Cal.4th at p. 876, italics added.) For example, "when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law. [Citations.]" (*Ibid.*)

However, "[i]f neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) " '[T]ypically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought.' [Citation.]" (*Hsu*, *supra*, 9 Cal.4th at p. 875.)

"[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by

'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Hsu*, *supra*, 9 Cal.4th at p. 876.)

" ' "On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." ' [Citations.] In other words, 'it is a discretionary trial court decision on the propriety or amount of statutory attorney fees to be awarded, but a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo.' [Citations.] In this case, where the material facts are largely not in dispute, our review is de novo." (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.)

C. *Whether Defendants Were the Parties Prevailing on the Contract Within the Meaning of Civil Code Section 1717*

We determine that defendants were the parties "prevailing on the contract" within the meaning of section 1717.

First, plaintiffs' first cause of action for declaratory relief was an "action on a contract" (§ 1717, subd. (a)), that is, an action on the CC&R's. Plaintiffs sought a declaration regarding the "authority, rights and duties" of the board and the parties "under the [CC&R's]." Plaintiffs also sought a declaration that the acts of the Association and its board "under the [CC&R's] with respect to rejection of [defendants'] application were valid." Where, as in this case, the plaintiffs seek "a determination of [the parties'] respective rights and duties under a contract . . . , the action is ' "on a contract" for purposes of section 1717.' " (*Mitchell Land*, *supra*, 158 Cal.App.4th at p. 489; accord, *Kachlon*, *supra*, 168 Cal.App.4th at p. 348.)

Second, defendants were the parties "prevailing on the contract." (§ 1717, subds. (a) & (b)(1).) Plaintiffs' civil action concerned the enforcement of the CC&R's.

As we have just explained, plaintiffs in their complaint sought a declaration confirming the validity of the actions by the Association and its board under the CC&R's in rejecting defendants' application for a fence. The trial court determined that plaintiffs, as part of their burden of proof, had "to establish that a duly elected Board of Directors followed proper procedures as it related to the issues in this case." The parties proceeded to trial with the understanding that this issue would be tried first. After hearing the evidence at trial, the court ruled adversely to the plaintiffs on this issue, finding that there was *not* a duly elected Board following established procedures, and thus no further issues were heard by the court and judgment was entered in defendants' favor. This was a case "when the decision on the litigated contract claim [was] purely good news for one party [(defendants)] and bad news for the other [(plaintiffs)]." (*Hsu, supra*, 9 Cal.4th at p. 876.) The court's determination was a "final resolution of the contract claim[]" between the parties and was entirely in defendants' favor. (*Ibid.*) As defendants defeated recovery by the plaintiffs on the contract claim, defendants were "the part[ies] prevailing on the contract under section 1717 as a matter of law." (*Ibid.*)

Our conclusion that defendants were the parties prevailing on the contract under section 1717 is supported by *Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826 (*Pueblo*). In *Pueblo*, the plaintiff filed a breach of contract action against the defendant corporation and two individual defendants. (*Id.* at p. 827.) The complaint alleged that the individual defendants were the alter egos of the defendant corporation. (*Id.* at p. 828.) The individual defendants filed a motion to bifurcate the alter ego issue from the breach of contract claim, and the trial court heard the alter ego issue first. (*Ibid.*) The trial court found in favor of the individual defendants on the alter ego issue and granted their motion for attorney's fees under section 1717. (*Ibid.*)

On appeal, the plaintiff contended that the breach of contract claim had not been decided by the trial court, and therefore the individual defendants were not entitled to attorney's fees under section 1717. (See *Pueblo, supra*, 163 Cal.App.4th at p. 829.) The

appellate court disagreed. The court explained that "the alter ego issue was essential to [plaintiff's claim]. [Plaintiff] could not reach the contract claim against [the individual defendants] without piercing the corporate veil. The claim of 'alter ego' was a step directly implicated in the contract action. Had [the plaintiff] prevailed on this claim, the ensuing litigation on the contract would unquestionably have entitled the prevailing party to attorney fees . . . . The mere fact that for judicial economy the alter ego issue was bifurcated in no way alters the nature of the action." (*Id.* at p. 830.) Because "[t]he trial court's determination that [the individual defendants] were not the alter egos of the corporation effectively ended the case as to them," the individual defendants "were entitled to recover attorney fees under the contract." (*Id.* at p. 829, fn. omitted.)

The facts in *Pueblo* are analogous to the instant case. Here, to prevail on the contract claim, in which plaintiffs sought a declaration concerning enforcement of the CC&R's and the validity of the actions by the Association and its board in rejecting defendants' fence application, plaintiffs had to establish that a duly elected board followed proper procedures as it related to those actions. Although the parties and the trial court characterized this issue as a "procedural" issue, which was tried first before any other issue, that characterization of the issue does not change the fact that the issue was "essential" to plaintiffs' case and had to be established as part of plaintiffs' burden of proof at trial. (*Pueblo*, *supra*, 163 Cal.App.4th at p. 830.) Further, as in *Pueblo*, plaintiffs in this case failed to meet their burden of proof on this issue tried first. However, "[h]ad [plaintiffs] prevailed on this claim [regarding a duly elected board], the ensuing litigation on the contract would unquestionably have entitled the prevailing party to attorney fees . . . . The mere fact that for judicial economy the [duly elected board] issue was bifurcated in no way alters the nature of the action." (*Ibid*.)

We are not persuaded by plaintiffs' contention that there was no final resolution of the contract claim because the trial court did not make a declaration regarding whether defendants "did or did not breach the CC&R's." According to plaintiffs, this issue is

"still an open question that can only be resolved by a subsequent suit by any owner to enforce the [CC&R's]."

The trial court's judgment *was* a final resolution regarding enforcement of the CC&R's by a homeowner (here, plaintiffs) with respect to the actions taken by the purported board of the Association on defendants' 2015 application for improvements on their property. The court determined that the Association was operating without bylaws and making decisions ad hoc, in violation of members' right to due process. Indeed plaintiffs acknowledge that the trial court determined that "bylaws were never 'certified,' " "that the process the [Association] followed to elect the directors was therefore not valid," and that the four-member board consequently "did not" have the "authority to review [defendants'] application." Based on the trial court's determination, plaintiffs were unable to achieve their "objective," which plaintiffs on appeal acknowledge was "to obtain a declaration that the Board's actions were valid." Contrary to plaintiffs' suggestion, it does not appear that a different result could be obtained in a new civil action by another homeowner, absent a change in the Association's governance. As the trial court explained, "[T]his [A]ssociation has to go back and figure out what they're going to do to govern themselves. Once they do that in a manner that complies with due process, they can start making decisions to effect their governance. Until they do, I think they'll keep coming back to this court *for a similar result*." (Italics added.) Obviously, a change in the Association's governance and new acts by the Association regarding defendants' fence would be a new factual situation and potentially raise a new controversy that would not, and could not, have been addressed by the trial court in the present action. However, as to the facts presented to the trial court in this action, the court's resolution of the contractual issue was final.

Plaintiffs' citation to *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968 (*DisputeSuite.com*), for the proposition that "fees under section 1717 are awarded to the party who prevailed on the contract overall, not to a party who prevailed only at an

interim procedural step" (*id.* at p. 977), does not advance plaintiffs' contention that there was no final resolution of the contract claim in this case. In *DisputeSuite.com*, the defendants in a contract action obtained a dismissal from a California court on the ground that the contracts at issue contained a forum selection clause specifying the courts of another jurisdiction, that is, Florida. (*Id.* at pp. 971-972.) The California Supreme Court concluded that "the trial court did not abuse its discretion in finding that defendants were not prevailing parties for purposes of section 1717. Considering that the action had already been refiled in the chosen jurisdiction and the parties' substantive disputes remained unresolved, the court could reasonably conclude neither party had yet achieved its litigation objectives to an extent warranting an award of fees. [Citations.]" (*Id.* at p. 971.) The California Supreme Court characterized the defendants as having "prevailed only on an interim motion that did not resolve the parties' contract dispute." (*Id.* at p. 977.)

In contrast to *DisputeSuite.com*, the litigation in this case did not end in one court due to an interim motion, with the litigation being moved to, or continued in, a different forum. (See *DisputeSuite.com*, *supra*, at 2 Cal.5th at p. 975 ["In obtaining dismissal in favor of a Florida venue, [the defendants] did not defeat [the plaintiff's] breach of contract and related claims, but succeeded only in moving their resolution to another forum"].) Rather, in the instant case, the trial court reached a final resolution of plaintiffs' claim following a trial and rendered judgment in favor of defendants.

We are also not persuaded by plaintiffs' contention that defendants were not parties "prevailing on the contract" (§ 1717, subd. (a)) because defendants failed to obtain the declaratory relief they requested from the trial court.

It appears that the trial court declined to award declaratory relief requested by defendants in their answer because the court believed that the request was "really not before" the court. In particular, during trial, the court questioned defendants' ability to obtain a declaratory judgment in the absence of a *cross-complaint* for declaratory relief.

Plaintiffs do not provide any legal authority suggesting that the trial court erred in this regard. (See Code Civ. Proc., § 431.30, subd. (c) ["Affirmative relief may not be claimed in the answer"].) Moreover, a defendant is not required to have obtained affirmative relief in order to be determined the prevailing party under section 1717. (*Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1554 [rejecting contention that a defendant must have obtained affirmative relief, rather than merely successfully defended, in order to be found a prevailing party under § 1717]; *David S. Karton, A Law Corp. v. Dougherty* (2014) 231 Cal.App.4th 600, 608 ["Dougherty did not file a cross-complaint, so his failure to obtain a money judgment or other affirmative relief from the court does not weigh against his claim to be the party prevailing on the contract"]; see also *Hsu*, *supra*, 9 Cal.4th at p. 875, fn. 10 [if there are cross-actions, and no relief is awarded in either action, the trial court may still find the defendant to be the prevailing party if the court determines that the defendant's cross-action "was essentially defensive in nature"].)

Plaintiffs' reliance on the trial court's statement that there were "no winners" is taken out of context and does not support their contention that defendants were not parties "prevailing on the contract" (§ 1717, subd. (a)). The court expressly stated at the conclusion of the trial, "I render judgment for the defense." Thereafter, before the proceeding was adjourned, the court remarked that the developers had left the neighborhood with a "mess." The court further observed that "there are no winners here today if you have to go back and start all over." The context in which the court made the "no winners" statement was clearly addressed to the fact that the neighborhood would have to "start all over" with respect to establishing a duly elected board. These concluding comments by the court do not bear on the legal question of whether defendants were the parties prevailing on the contract within the meaning of section 1717.

Lastly, we do not find compelling plaintiffs' argument that the order awarding attorney's fees was erroneous because the "trial court did not affirmatively award attorneys' fees" at the conclusion of trial, and therefore "the trial court did not intend for [defendants] to be the prevailing party."

The trial court's written judgment provided that "entitlement to attorneys fees shall be determined by noticed motion." The court thereafter awarded attorney's fees to defendants Newman and Gerhardt following a noticed motion and hearing. Plaintiffs do not provide legal authority for the proposition that the prevailing party determination under section 1717 must be determined by the court immediately upon the conclusion of trial, or that the court's failure to do so precludes the court from awarding such fees upon a subsequent motion by a party. (See § 1717, subd. (b)(1) ["The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment"]; *Kaufman v. Diskeeper Corp.* (2014) 229 Cal.App.4th 1, 7.)

We conclude that the trial court properly awarded attorney's fees to defendants under section 1717. Having reached this conclusion, we do not address whether section 5975 was also a proper legal basis for the award of attorney's fees to defendants.

D. *Attorney's Fees on Appeal*

Defendants Newman and Gerhardt have requested appellate attorney's fees. " 'Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees.' [Citation.]" (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1267.) Accordingly, upon an appropriate motion, the trial court is to consider whether attorney's fees incurred on appeal should be awarded and, if so, the amount. (See *ibid.*; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 320.)

IV. DISPOSITION

The April 13, 2017 order is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DANNER, J.

Hunkle v. Gerdhardt
H044753